

# Native American Studies

Clara Sue Kidwell & Alan Velie





## Historical Contact and Conflict

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Our second premise is that the cultural contact between Indians and Europeans must be seen from the perspectives of both sides. We propose not a complete counter-narrative from a strictly Native point of view, but rather a recognition of the fact that Indian people have their own accounts of these intercultural encounters, which may differ significantly from those of Europeans, and which play an essential role in understanding how they viewed their role.

Key to the premise is the understanding that there are distinctive aspects of Indian views of history. Oral narratives and place names constitute parts of this uniquely Native perspective on the past. As we have pointed out, Indians regard cycles of events – that is, repetition – as more important than a linear narrative of unique events and change, which constitutes our contemporary academic notion of history. Indians were and are, however, able to deal with the unique events in their own way. Plains Indians' winter counts, images painted in spiral fashion on hides, record a significant event for each year.<sup>1</sup> Communities may preserve the memory of events in stories and ceremonies. Alfonso Ortiz, a Tewa from San Juan Pueblo and professor of anthropology at the University of New Mexico, described how Jesse Jackson, presidential candidate in 1984, went to the Hopi reservation to campaign for votes. He gave a speech in his distinctive, often rhyming, rhetoric. In the next major ceremonial in that community, a clown appeared dressed in a pinstriped suit and an orange Afro-style wig and proceeded to deliver a reprise of Jackson's speech in the Hopi language. As Ortiz explained, the clown represented the Hopi way of integrating a unique event into their own sense of history.<sup>2</sup> If he continued to appear in future



ceremonies, then Jesse Jackson would be part of Hopi history. If not, the Hopi would have dismissed Jackson as irrelevant. In Ortiz's story particularly, we find one of the distinctions between local knowledge and global knowledge that is essential to Native American Studies. What is important to Native communities is how the unique event may affect their own lives, not the global understanding of history.

Local histories and global histories represent two ways of understanding events that change the patterns of human life. The premise of this chapter is concerned with intercultural contact situations as historical phenomena because they are the beginning of significant changes for both Natives and Europeans, and in that sense they are important to the academic enterprise in which we are engaged. Inherent in our premise is the assumption that Indians are active agents in their history, not simply passive victims or obstacles to someone else's progress.

The narrative of American history that dominates public education in the United States still generally portrays Indians as the helpless victims of a militarily and culturally superior civilization. In the 1970s, both popular books, such as Dee Brown's *Bury My Heart at Wounded Knee* and Ralph Andrist's *The Long Death*, and the scholarly book *The Conquest of America*, by Francis Jennings, emphasized the atrocities perpetrated against Indians.<sup>3</sup> It was not until James Merrell demonstrated how the Catawba in South Carolina survived as a tribe that Indian agency became recognized as a major factor in history. The Catawba maintained a covert sense of identity through kinship ties even as they lost their lands and largely ceased to be recognized as Indians by surrounding black and white populations.<sup>4</sup>

It is relatively recently that historians have begun to acknowledge the roles of Indians as agents in history. There is a new emphasis on including the voices of people who have not been heard before. The fact that American Indians did not have written languages has meant that their viewpoints had long been excluded from the academic study of history, which principally depends upon written records. Indian voices in the early historical record must be reconstructed from European accounts. European missionaries, among the most literate of early colonizers, were also often astute ethnographers who recorded voluminous details of the cultures of those they wished to convert to Christianity; however, their culturally-based assumptions about Native people strongly colored their judgments.

The joining of aspects of anthropology with history produced the field of ethnohistory in the 1950s. The method known as 'upstreaming' involves determining cultural practices in contemporary communities and studying

historical accounts of those communities to search for persistent practices, attitudes, and explanations that indicate continuity.<sup>5</sup> Although the ethnohistorical method has come under criticism for over-insistence on elements of cultural continuity, many scholars understand its usefulness as an interpretive tool to understand the cultural dimensions of historical knowledge. The most important thing about ethnohistory as a method is its insistence on attention to cultural perspective, and its recognition of the fact that cultures are dynamic rather than static.<sup>6</sup>

The establishment of ethnohistory in the academy has resulted in the inclusion of Native voices in the writing of history, challenging the ostensibly objective examination of the human past in the academy. Objectivity presupposes a neutral stance and an omniscient third-party observer of events, but, as scholars like historian Hayden White and anthropologist James Clifford have argued, pure academic objectivity is an impossibility.<sup>7</sup>

Another factor that complicates the study of the history of intercultural contact is that many oral narratives of historical episodes have been filed under the academic category of folklore, which says something in itself about how Native versions of historical events have been viewed by non-Indian scholars. However, such narratives can prove to be valuable accounts of events of the distant past. William Simmons's study of Passamquoddy and Narragansett narratives demonstrates the value of such allusions, for instance, in accounts of early encounters with black people and the building of the first bridge from an island community to the mainland.<sup>8</sup>

Indian ways of telling their past are essentially different from European ways of writing history; Indian voices must be heard, and their understanding of their interactions with Europeans must be part of historical accounts. The inclusion of these perspectives has led to new interpretations in the writing of American history by both Native and non-Native scholars. Indian historians have introduced tribal perspectives into the histories of their own tribes,<sup>9</sup> and non-Indian historians have increasingly paid attention to cultural identity in the process of historical change.<sup>10</sup>

The result of the inclusion of Native voices is not only to prove that Indians were active participants in their encounters with European colonists, but to show how both Native and non-Native cultures changed as a result of their contacts.<sup>11</sup> Richard White's *The Middle Ground* describes attempts of Indians and European colonists to negotiate common understandings from cultural differences.<sup>12</sup> The result was not a totally homogeneous new culture but the establishment of new communities where



Natives and colonists could achieve a greater understanding of each other. Although the concept of a 'middle ground' as White explicates it was a historical phenomenon in that it happened in a particular area at a particular time in American history, it has become commonly used to study intercultural contact with attention to cultural understandings on the part of both groups involved.

Native people supplied the English colonists at Plymouth and Jamestown with the food that allowed them to survive their first winter in their new homes. The first Thanksgiving idealized in American history, was not a gathering of equals but the colonists' acknowledgement of their dependence on the Indians. Indians were shrewd negotiators diplomatically. They were also shrewd traders, and they were quite capable of playing both ends against the middle in the wars that went on throughout the period between colonial powers.

As some of the cherished myths of American history have been discredited — George Washington did not, indeed, chop down the cherry tree and confess the deed to his father — history told from tribal perspectives has led to new understanding of some questionable historical traditions. Pocahontas did not save John Smith out of love, but in order to adopt him as a kinsman to establish a relationship that would allow the colonists and the Powhatans to live together in peace.<sup>13</sup> Although the Walt Disney movie *Pocahontas* perpetuates the myth of romantic love between the beautiful Indian maiden and the handsome white man, from the cultural perspective of a Powhatan woman, John Smith became a relative, and when Pocahontas met John Smith in England after she had married John Rolfe, she reaffirmed that kinship relationship.<sup>14</sup>

Early diplomatic relationships between Europeans and Indians reveal diverse perspectives based on different notions of kinship. French rhetoric cast the Indians as children who must be subservient to their French 'fathers.' The Indians, in turn, dutifully responded with speeches that expressed their dependency on the French. What the Frenchmen did not realize was that in the kinship systems of the Indians, the father was a relatively powerless figure. Rather, the maternal uncle was the person who had the greatest responsibility for the well-being of his sister's children. The rhetoric of the French defeated their purposes, while Indians used their own rhetoric of dependency as a tool with which they could acquire trade goods.<sup>15</sup> The anthropological idea of fictive kinship relationships is useful for understanding how Indian ideas about familial obligations were mechanisms for establishing relationships with European colonists.

In the American southwest, Indian communities constantly encountered explorers and missionaries who had little respect for their beliefs. Father Benavides, a Spanish Franciscan priest, disparaged the Navajo faith of native healers, urging them instead to touch the cross that he carried in order to be healed by the Christian God.<sup>16</sup> In northeastern North America, Jesuit missionaries sought to force the Indians into a state of Christian submissiveness to the will of God. In Catholic theology, the Indians were guilty of the sin of pride, the idea that they were the equals of God. In their own beliefs, however, the Indians were able to establish personal relationships with spiritual forces through dreams and visions. Those relationships allowed men to influence the actions of the spiritual world. What to the Jesuits was the sin of pride was the very essence of native beliefs.<sup>17</sup>

European trade goods, such as copper kettles, guns, traps and cloth, changed Indian lifestyles irrevocably. They brought about major changes in the ways in which Indians hunted and clothed themselves, but they did not substantially alter their world views. The new goods were adopted as analogous to traditional items. Trade beads were similar to naturally occurring crystals used for divination. Guns replicated thunder, a powerful natural force. Copper kettles were used for cooking, but they were also buried with the dead, as was native pottery.<sup>18</sup>

Although warfare was a factor in population decline in Native communities, scholarly attention in the 1970s and after focused increasingly on the role that European-introduced diseases played in that decline.<sup>19</sup> Indeed, historical demography became an important, and sometimes contentious field as scholars attempted to come to some definitive figure for aboriginal populations as a baseline for decline.<sup>20</sup> Depopulation was generally interpreted by Europeans as God's act, as John Winthrop phrased it, 'to clear the land for the Sons of Adam,' while Indians often interpreted it as punishment for their acceptance of European customs and goods. Even the decline of animal populations was interpreted as the animals' withdrawal from human contact because of the new ways of hunting.<sup>21</sup>

The impact of disease was not merely the loss of population but the disruption of the highly structured social relationships of obligation and reciprocity that held Native communities together. That destruction and the overwhelming flood of English settlers on the eastern seaboard soon began to overwhelm Indian communities. Indian resistance to white settlement became increasingly violent. In the south, Opechancanough, the nephew of Powhatan, led a major attack on settlements around Jamestown in 1622. In New England, Metacomb, known to the English as King Phillip, led his



followers in attacks on frontier villages in 1675, thus introducing the indelible image of the hostile savage into the American consciousness.<sup>22</sup>

Warfare was not simply a response to the threat that Europeans posed to Native communities. It was spiritually sanctioned. The Ottawa leader Pontiac acted under the guidance of the Delaware prophet Neolin. The Shawnee Tecumseh attempted to build an Indian coalition to drive the Europeans out of the United States based on his brother Tenskwatawa's spiritual visions.<sup>23</sup>

The failure of Pontiac and Tecumseh to achieve their ends of concerted action against the whites was as much a result of the persistence of tribal identities as of American military superiority. Indians saw no racial basis to provide a sense of common purpose against European settlement. The impact of war and trade brought Indians and Europeans into contact on an intimate basis and required new ways of cross-cultural communication. Inter-marriage between European men and Indian women became an important factor in cross-cultural communication, and the children of these unions created new kinds of communities. The relationship between early colonial governments and the US government and the Indian tribes was defined by treaties based on the status of tribes as sovereign nations. Early treaties simply established peace and friendship between tribes and colonial governments and the United States. As Indian tribes lost population to disease, as their hunting grounds were depleted of game, and as they were defeated in battle, the treaties that they signed increasingly led to agreements to place themselves under the protection of the US government and to cede much of their lands. These treaties did not interfere with the tribes' exercise of their own self-governance; they did, however, introduce the problem of jurisdiction of Indian tribes over non-Indians within their lands, and as European population grew, colonial governments were increasingly unable to police the actions of their citizens on the frontier.

As the United States emerged as the dominant political power in North America after the Revolutionary War, the conduct of relations with the Indians became the government's major preoccupation, not only because trade with Indian nations was still a viable economic enterprise, but because it needed Indian land. Soldiers in the Revolutionary army were paid in land scrip, paper certificates that they could use to claim and settle on public lands, but the government had first to clear Indians from the land. The sale of public land, that is, Indian land acquired by treaty, was the major source of revenue for the government which was still deeply in debt in the first years after the Revolution.

Americans were often unscrupulous in their dealings with Indians. President Thomas Jefferson saw Indian trading debts as an incentive for Indians to cede land to pay those debts, while he himself was a land speculator.<sup>24</sup> Chief Justice John Marshall formulated the legal argument in 1824 that Indians did not have title to their lands in the Western sense but enjoyed only the right of occupancy. Although he acknowledged the rights of tribes to govern their own internal affairs in two important decisions in 1831 and 1832, he defined the relationship of tribes to the federal government as that of 'dependent domestic nations.'<sup>25</sup> Marshall's decisions were followed by Indian removal, the federal policy of removing Indians from lands east of the Mississippi River to the western territory acquired by the United States in the Louisiana Purchase.

The issue of removal caused deep divisions in tribes, and it inspired diverse and strongly opposing opinions among Christian missionary leaders, government bureaucrats, and common people hungry for new lands to settle. There were reasoned opinions both for and against removal in both Indian and white communities. The rhetoric of removal as federal policy was that the uncivilized Indians must be removed from the pernicious influences of white frontier society before they were overrun and totally destroyed by it. Read another way, the rhetoric revealed the political reality that white men wanted Indian land. Studies of the removal policy and its effects have contributed to our understanding of the forces of historical change that were at work within Indian communities as well as of the changes in the relationship between tribes and the US government.<sup>26</sup>

The act confronted southeastern tribes with the political reality that peaceful coexistence with white populations was impossible. A significant part of the Cherokee population in Georgia was civilized, to all intents and purposes. They had schools and churches, a written language in the Cherokee syllabary, a newspaper, *The Cherokee Phoenix*, published in English and Cherokee, a written constitution and laws.<sup>27</sup> The neighboring Choctaws, Chickasaws, and Creeks had adopted many practices from their white neighbors. But as the states of Georgia, Alabama, and Mississippi extended their laws and jurisdiction over the Cherokees, Creeks, Choctaws, and Chickasaws within their boundaries, the tribes were faced with the dilemma of staying in their homelands (the primary source of their cultural identity) or maintaining their tribal identity as self-governing nations by moving west of the Mississippi River. The fact is that the removal period was not a simple black (or red) and white case of a conflict between hostile savages and civilized American society. It was a highly complex interaction



of motives both selfish and altruistic, cultural and political, idealistic and mundane. Historical analysis of those motives enriches our understanding that both American society and tribal cultures were changing rapidly, and in some ways that understanding makes even more poignant and tragic the ultimate removal of Indian tribes to the west.

Given Georgia's insistence that the US government fulfill a promise to remove Indians from its boundaries, and given Andrew Jackson's determination to rid the United States of tribes as sovereign enclaves within the United States, it was clear that Indian nations had virtually no choice in the matter. Removal treaties were signed by small factions of tribes and, in the case of the Cherokees and Creeks, promptly repudiated by other leaders. Although some of the Cherokees moved west voluntarily, for the rest the forced removal of 1838 became known as the Trail of Tears, or *Numa daul Tsunyi*.

The general perception that all Indians left the southeast during the removal period is inaccurate: recent studies demonstrate that Indians did not entirely disappear from the region, and that loss of homeland did not negate their sense of identity. Instead, groups who escaped removal used various strategies to maintain communities. Although many of these studies have been undertaken by anthropologists rather than historians, they collect the voices of people who often express their own sense of the historical persistence of the tribal identity.<sup>28</sup>

The tribes of the northeast and the Ohio River Valley were dispossessed of their lands early in the nineteenth century as a result of war. Their possessions of land were largely forced, and they began a trek that would eventually lead them to settlement in what is now the state of Oklahoma.<sup>29</sup> The tribes of the Plains, who were to encounter the press of American expansionism in the era of Manifest Destiny, and whose sense of homeland was much different from that of the southeastern tribes, ceded lands they had always used for hunting. At stake for these tribes was freedom to move without restriction over the territories that they had traditionally used, a freedom finally constrained by treaties that confined them to reservations and maintained them there in part through military force.<sup>30</sup>

The ultimate fate of most Indian tribes in the late nineteenth century was really a foregone conclusion based on federal policy to divide Indian land into individual plots that individuals would hold as private property and to subsume Indian Territory into the United States. The idea was not new in the late nineteenth century. Indeed, its roots were deeply embedded in the Jeffersonian ideal of the yeoman farmer, and its intent became clear in the

debate over the Kansas-Nebraska bill in 1854. It was implicit in the expansion of railroads and the desire to drive them through Indian Territory. It was subsumed in the debate over slavery, that is, free soil or slave territory, which was in turn complicated by the fact that one aspect of civilization adopted by the Cherokee, Choctaws, Chickasaws, and Creeks was the institution of slavery.<sup>31</sup>

The Five Tribes (now including the Seminoles) fought with the Confederacy, although again, their participation in the war was the cause of deep tribal divisions. After the war, the United States argued treason, while the tribes argued that the United States had abrogated its treaty obligation to protect the tribes by withdrawing its forces from Indian Territory in the face of Confederate advances. A plan for allotment of land and extension of a federal Territorial government was written into the treaties that the tribes were forced to sign after the war. It was clear that the United States planned to 'reconstruct' the tribes as part of a state within the United States.

If the rhetoric of the early nineteenth century was to save the Indians from extinction by removing them from contact with white society, the rhetoric of the latter part of the century was to give them the civilizing benefits of their own homes, private property, and American citizenship, and to assimilate them into American society.<sup>32</sup> Ironically, the Act came at a time when the life of the yeoman farmer was far from ideal, as evidenced by the rise of the Populist Party, the existence of the Granger Movement, and the struggle over currency reform to relieve farmers from crushing debts. That the Dawes Act proposed an agrarian model that was proving dysfunctional in the face of an increasingly industrialized society speaks as much to its hope for American social and political reform and the destruction of both land and corporate monopolies as it does to its naivety about Indians.

The policy of allotment was embodied in the General Allotment Act of 1887 (also known as the Dawes Act after its sponsor, Senator Henry L. Dawes of Massachusetts). The Five Tribes and several others in the Indian Territory were exempt from the act, the Five Tribes because they held fee simple title to their lands from the Federal government. But the Indian Territory now was home to a rapidly growing population of white entrepreneurs and laborers hired by Indians who lived without any form of government or protection of laws. In order to extend federal law over the white population and give them rights to claim land upon which they could live, Congress appointed a commission headed by Henry Dawes to convince the Five Tribes to accept allotment, and their coerced agreement to do so was embodied in the Curtis Act, passed in 1898.

Allotment destroyed the land base of many tribes as individual owners sold or were cheated out of their land. It challenged the identity of American Indians as a people associated with the land. Its long-term effects undermined Indian senses of communal identity as people sold or lost land and moved away to urban areas, although in the short term it may have reinforced them in a negative way since individuals who had land took in their kin who had lost their lands under the allotment process.<sup>33</sup>

The other major agent of cultural assimilation of American Indians in the late nineteenth and early twentieth centuries was the boarding school. Although boarding schools have been generally portrayed as destructive to American Indian cultures (and certainly their stated purposes were, as Richard Henry Pratt, founder of Carlisle Indian School in Pennsylvania (1879) declared, to kill the Indian in order to preserve the man), recent scholarship on boarding schools from the perspectives of the students therein reveals that they served an important role as vehicles for cultural preservation, in the form of resistance to non-Indian authority. As Tsianina Lomawaima points out in her study of Chilocco Boarding School in Oklahoma, students formed friendships that lasted beyond the school years, friendships that reinforced a sense of Indian identity. They also found inventive ways to subvert the authority that schools tried to impose upon them. Brenda Child points out in her study of boarding schools where Chippewa students were sent that schools sometimes provided a nurturing environment for students whose own home lives had been totally disrupted by poverty and often the death of a parent. Clyde Ellis's study of the Rainy Mountain Boarding School in Oklahoma, which served primarily Kiowa children, shows that the school did not totally destroy the Indian identity of its students, and that the school's staff suffered as much from financial neglect by the federal government as did the students.<sup>34</sup> The contribution to scholarship in the field of history of education has been a much more nuanced view of the boarding school experience.

Fred Hoxie has argued persuasively that the perceived failure of Indians to assimilate into American society led to the disillusionment of liberal reformers and a return to a general notion of the wardship status of American Indians.<sup>35</sup> The shift in federal policy away from assimilation came gradually in the early twentieth century. The impoverishment of Indians because of the effects of allotment, and the often overcrowded and unhealthy conditions in boarding schools were brought to light in the Meriam report of 1928. The report, undertaken by the Institute for Government Affairs (the forerunner of the present day Brookings Institute)

under the direction of Louis Meriam, revealed unsanitary water supplies, inadequate housing, widespread incidence of disease (including high rates of tuberculosis and trachoma in the boarding schools), and general incompetence in the administration of services for Indians by the Bureau of Indian Affairs. However, the report blamed most of the problems of Indian poverty on the fact that Indians leased their land to non-Indians and lived off 'unearned income' rather than applying themselves to farming. Its main solution to the problems of Indian administration was to increase the education budget so Indians could learn how to live the lives of good American citizens.<sup>36</sup>

The onset of the Great Depression in 1929 ended any hope of major funding for Indian-related initiatives, but it did pave the way for Franklin Roosevelt's New Deal. The policies of John Collier, Roosevelt's Commissioner of Indian Affairs, began a movement in the direction of restoration of tribal sovereignty. Collier believed in supporting the communal cultures of the tribes, cultures badly damaged by the Dawes Act. He said, 'Clan instinct, clan operation of assets, is inherent in [Indians]. The tribal Indian remains the self-reliant and self-supporting Indian.'<sup>37</sup> The Wheeler-Howard (or Indian Reorganization) Act, passed in 1934, put into effect Collier's policies on self-government, preservation of religion and culture, economic opportunity, and communal land ownership, even though Congress watered down his original proposals. After years of steady decline, Indian economic fortunes finally began to rebound.

The Indian Reorganization Act (IRA) was, at the time of its passage, a highly controversial piece of legislation, both in Congress and among members of Indian tribes. Although Collier has been portrayed as a visionary reformer, and indeed his own writings reflect a highly romanticized notion of the integrity of Indian cultures, his policies were not widely accepted by American Indians. Because Collier respected the rights of Indians to govern themselves, tribes had to vote whether to accept the terms of the act, and a number opted not to do so. The Act remains controversial today. With its emphasis on economic development and self sufficiency, it is also read by Vine Deloria, Jr and Clifford Lytle as an early form of the termination policy that would later be implemented by the Federal government in the 1950s. What the IRA did accomplish, as Deloria and Lytle argue, was to establish a principle of the inherent sovereignty of tribes, and that principle came not in the act itself but in an opinion by Attorney General Nathan Margold asserting that tribal sovereignty was inherent rather than delegated by Congress.<sup>38</sup>

The Second World War drew 25,000 Indians into the Armed Forces, and many to employment in war plants. Many veterans returned from the war with an expanded view of American society and its opportunities, although many had also experienced overt racism in the Armed Services.<sup>39</sup> During the war, the government had significantly reduced the size of the Bureau of Indian Affairs and moved it out of Washington to Chicago. After the war, the federal government's attempt to downsize itself, and the general prosperity of American society in the post-war economic boom, led to the formation of policy to terminate the federal responsibility to American Indians, embodied by Congress in House Resolution 108, passed in 1953. Dillon Myer, the man who oversaw the internment of the Japanese during the Second World War, became Commissioner of Indian Affairs and began the program of removing tribes from their special relationship with the federal government, thereby eliminating federal services. An aspect of the termination policy was the relocation of Indians from reservations to major urban areas where, it was assumed, they would find ready employment because of the thriving US economy.<sup>40</sup> Although Indians had been migrating to cities for years, the relocation policy of the early 1950s created new communities, pan-tribal in their make-up but still a significant source of Indian identity. Although life in urban American often exposed Indians to racism and hostility, and its economic benefits were often far overrated (themes developed in the burgeoning field of Native American literature), scholars have begun to explore the strength of those communities as sources of individual and group identity.<sup>41</sup>

If the goal of termination was to make Indians more self-sufficient by taking away federal funds and thus to save government money, it failed miserably. In terminating the Menominee in Wisconsin, for instance, the federal government spent \$5 million in special aid, the state of Wisconsin spent \$1 million in additional funds, while healthcare, education, and the Menominee economy were greatly weakened. In the case of virtually every tribe, termination weakened self-sufficiency, reduced vital services, and ended up costing the government more money than it otherwise would have spent.<sup>42</sup>

Relocation and termination were no more effective solutions to problems of poverty and poor health among Indian people than removal and allotment had been, but urban Indian centers in the 1960s became places where Indian voices began to speak out very audibly against racism and oppression. The takeover of Alcatraz Island in San Francisco Bay in November 1969 was organized by a Chippewa businessman living San Francisco, and

the first wave of occupiers was composed largely of college students from Bay Area institutions. The event attracted major media attention across the nation, although it ended with a whimper when the last few occupiers were removed by the Coast Guard in the spring of 1971.<sup>43</sup> The American Indian Movement emerged out of police harassment of Indians in the Franklin Avenue neighborhood of Minneapolis, and achieved its media prominence with the takeover in 1972 of a store in the village of Wounded Knee, South Dakota, site of a massacre of some 300 Lakota people in 1890.<sup>44</sup> The other major wellspring of Indian activism — protests over restrictions on Indian fishing rights on the northwest coast — also gained attention when actor Marlon Brando espoused the Indians' cause.<sup>45</sup> The rise of the Red Power movement has been a fertile field for research because it has allowed scholars to present Indian perspectives on both their history and their conditions in the mid-twentieth century.

## CONCLUSION

The challenge of telling history from a native perspective in the later part of the nineteenth century is that the cultures of tribes had been so disrupted by depopulation, Christian missionary efforts, and loss of their land base that much of their knowledge of the past has been lost. Culture is, however, a dynamic process. In a historical sense, it is always changing and adapting to new circumstances. And this is one of the challenges that Native American Studies faces in dealing with cultural contact: to demonstrate a sense of Indian identity while recognizing the cultural adaptation that tribes have undergone over time.

The writing of American Indian history has also introduced new methodologies. The academic discipline of history is a construction of a particular time and place (the ancient Greek world) that has evolved within the subsequent Western intellectual tradition of skepticism and objectivity. Native history is also a construction of time and place, but with much different meanings, that is, cyclical time and the spirituality of place.

Indian intellectuals have seen history as a European colonial enterprise aimed to undermining the integrity of Indian cultures and communities, Native American Studies scholars have called for a new relationship between historians and Native people in which respect and reciprocity prevail. Historians, they insist, must let Indian communities determine what is needed in the way of knowledge to protect their rights and interests.



Communities must have the final authority over the texts that historians produce because community members are the ultimate source of knowledge of their own histories. This stance seems to fly in the face of historical objectivity in the academic sense, but it is a powerful statement about the ultimate subjectivity of historical knowledge.<sup>46</sup>

The field of Native American Studies has moved Indians out of the role of passive victims in an inevitable historical process and into the role of active participants in a process of change and adaptation that has affected both parties in intercultural encounters. It challenges a still widely prevalent belief in the US that all the 'real Indians' died off by 1890, overwhelmed by American military superiority and their inability to adapt to new ways of life. Native American Studies balances the tensions between federal policies and societal forces pushing Indians to assimilate completely into American society and Native strategies of adapting aspects of Anglo society as a means of survival for their communities.

By looking for Indian voices in cultural encounters and hearing them from a cultural viewpoint, Native American Studies can examine the expectations held by parties in the encounter, and how they were fulfilled (if, indeed, they were fulfilled) at some historical moment. Studies of missionary efforts among American Indian tribes can reveal the irony of the historical doctrine of unintended consequences. Missionaries wanted to convert Indians to Christianity, but Indians wanted schools so they could learn to better cope with white society. The federal government saw Christianity as a means to accomplish a policy of assimilating Indians into American society, whereas Indian communities often subverted churches into centers for community activities that reinforced markers of identity such as language (preaching and hymns in Native languages), community feasts, and stickball games in the southeast.<sup>47</sup> The number of books on Native American history has grown tremendously since the 1970s, and they document the persistence of Native communities by demonstrating that cultural change does not mean total assimilation.<sup>48</sup>

If the writing of history by non-Natives has been a colonialist act that has imposed the colonizer's meaning on the Native American past, then contemporary scholars have adopted the academy's term in calling for the de-colonizing of Native American Studies. A part of that call is for the establishment of a code of professional ethics in the field. What are the responsibilities of researchers to the communities whose history they study?

In the Western tradition, history is generally composed of accounts of the actions of individuals. In contemporary America, however, Native

scholars hold up the sense of community as one of the markers of Indian identity.<sup>49</sup> In casual conversation, 'the community' is held up as the touchstone for cultural authority. The term implies a sense of respect for and deference to a collective sense of cultural values and appropriate behavior, and a sense of responsibility to the group. In this sense, the scholar who enters the community becomes, then, not the expert but truly a student learning from the elders who express the shared memory of the community. It also means, however, that the scholar must put aside the skepticism concerning sources that the academic world expects in its search for objectivity, and must become, in effect, the voice of 'the community.'

Should scholars be responsible to communities by their histories as they hear them from the elders? Here again we confront the challenge of local knowledge and global knowledge. Native histories are found in oral traditions, what is often labeled as folklore. It often does not match written sources. It is very much the story of day-to-day life in communities. If one of the goals of Native American Studies programs is to educate non-Indians about Indians, then we come back to the epistemological question, how can non-Natives understand a truly Native narrative as 'history' in the academic sense?

The problem is illustrated by such books as Patricia Nelson Limerick's *Legacy of Conquest* and Richard White's *Its Your Misfortune and None of my Own*, part of the canon of the New Western History.<sup>50</sup> Both have been controversial among professional historians with their insistence that the stories of all groups involved in the formation of Western society be represented. By challenging an established narrative of American progress and the triumph of modern industrial society, these books have de-centered American history.

The challenge to Native American/American Indian Studies, then, is to bring to the fore the perspectives of Native people, to establish the legitimacy of their way of telling their own histories, and because they have been part of American history in their interactions with European colonists, to ensure that their motives and actions are fully represented.

## NOTES

<sup>1</sup>Russell Thornton, 'A Rosebud Reservation winter count, circa 1751-1752 to 1886-1887,' *Ethnohistory* 49: 4 (Fall 2002), 725-41.

<sup>2</sup>Monso Ortiz, presentation at National Endowment for the Humanities Summer Institute for College Teachers, 'Myth, memory and history, new approaches to



- writing American Indian History,' The Newberry Library, Chicago, Illinois, June 1990.
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## Tribal Sovereignty

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The sovereignty of American Indian tribes is a function of their original occupation of the United States as self-governing entities. It is an inherent right, although the Congress of the United States has maintained at times that it was merely delegated to tribes by the federal government.

The sovereign rights exercised by tribes in contemporary society include the right to determine membership, the right to tax their members, the right to regulate internal civil and criminal matters, and the right of sovereign immunity.<sup>1</sup> American Indian tribes are unique and individual groups, although the federal government has at times acted on the assumption that Indians constituted a racial group. The Supreme Court case of *Morton v. Mancari*, 417 US 535 (1974) affirmed the Indian preference policy of the Bureau of Indian Affairs in the face of federal laws against racial discrimination. The decision was based on racially-based hiring as a tool for carrying out federal policy, but it was important because it affirmed the special status of Indians before the law.

Politically, American Indians have a unique relationship with the federal government based on the treaties that they made as sovereign nations, first with the European colonizing powers and then with the United States. American Indians can argue that their governments predate the United States Constitution, and that their sovereign powers cannot be constrained by the federal government, although the form of many contemporary tribal governments was dictated by the United States under the Indian Reorganization Act of 1934.

Tribal sovereignty is a basic concept for Native American Studies, and the unique, fiduciary responsibility that the United States has toward

Indian tribes is an essential aspect of political identity for Indian people in the United States today. Sovereignty is a concept of which the meaning has been continually negotiated throughout the history of contact with European colonizers because, although it is held to be an inherent right, its political effect depends upon its recognition by other sovereigns.

Tribes initially signed treaties from positions of power as European governments attempted to establish their claims to new lands for settlement and wealth. The balance of power shifted as diseases took their toll of Native populations, and as Europeans came in increasing numbers to occupy the land. The status of Indian tribes as sovereign entities has changed over time, and it continues to evolve in contemporary society. The basic premise of sovereignty is, however, accepted as a given in Native American Studies.<sup>2</sup>

A corollary premise is that cultural integrity is integrally related to sovereignty. This is a political and social construct rather than a legal one. Cultural continuity is a requirement for federal recognition for tribes, but once a tribe is recognized, it is not compelled to demonstrate continuing culture. Politically however, if American Indians cannot demonstrate their cultural distinctiveness within American society, Congress can simply terminate its government-to-government relationships with tribes and deny their sovereignty, as happened during the termination era of the 1950s. If Indians look, act, talk, and live like all other Americans, Congress can simply cease to recognize that they exercise sovereign rights. Attempts by states to tax American Indians or to reduce federal appropriations for services when tribes are economically successful are examples of on-going attacks on the basic principles of tribal sovereignty.

Loss of federal recognition would not mean the end of tribal sovereignty per se, since tribes assert their sovereignty as an inherent right rather than one delegated by the US government. In the case of *Menominee Tribe v. United States*, 391 U.S. 404 (1968) the US Supreme Court held that tribal treaty rights to hunt and fish on certain lands remained despite the termination of the tribal government. Tribes could indeed continue to govern themselves without federal recognition. Any small, rural community that elects a mayor, city councilmen, and justices of the peace and has the power to regulate the behavior of its citizens, for example, has a degree of sovereignty, but it is delegated by the state. Tribes could maintain their governments, but they would be subject to the powers of state and local governments in a way that they are not with their special status vis à vis the US government.

There is an inherent tension in the concept of sovereignty between the idea of federal responsibility toward tribes as defined in treaty relations, and the assertion by tribes that they are not subject to federal power. Treaties give tribes the right to call upon the federal government for protection and services, in exchange for which tribes have generally given up land and committed themselves to loyalty to the United States. Treaty obligations and notions of inherent sovereignty reside uneasily together. This tension has revealed itself in different ways over time. From John Marshall's decisions in the 1830s, in which he acknowledged the rights of tribes to govern their own internal affairs, through the decision in *Lone Wolf v. Hitchcock* in 1903, which established the doctrine of the plenary power of Congress over Indians, to assertions by contemporary US Congressmen that tribes are simply voluntary political organizations, the relationship between tribes and the US government has been the subject of constant negotiation and evolving ideas about what constitutes tribal identity.<sup>3</sup>

#### THE TRADE AND INTERCOURSE ACTS

Under the terms of treaties that promised that the US government would protect Indian lands from invasion by non-Indians, Congress began regulating the actions of US citizens in relation to Indians, thus preempting state power to do so. It also established a basic jurisdictional principle that the federal government regulated its citizens, and Indian tribes regulated the behavior of their citizens. The first of a series of Trade and Intercourse acts was passed in 1790. An important area of this regulation involved the Indian trade. As with colonial governments, it behooved the United States to maintain peaceful and fair relationships between traders and Indians in order to promote the trade. The Act required traders to acquire licenses before they could enter Indian territory, and prohibited the introduction of alcohol. The original Trade and Intercourse act was made permanent in 1834 after being renewed by Congress on a regular basis until then.<sup>4</sup> It remained in force until late in the nineteenth century.

#### THE MARSHALL TRILOGY

The decisions of Supreme Court Justice John Marshall, the so-called 'Marshall trilogy,' are cited as the basis for the fiduciary relationship



between the tribes and the US government. The unique historical relationship of tribes to the US government was first defined in these decisions, the broader historical picture. Marshall's decisions collectively establish important principles in defining the general power of the judiciary branch of the US government with respect to the legislative and executive branches.<sup>5</sup> Marshall's decisions were also made in the political context of the struggle between states' rights and the powers of the federal government, a struggle that has been a recurrent theme in American history and is increasingly a theme in contemporary issues of tribes vis à vis the state.

In 1823, in the case of *Johnson and Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), the basic question was to establish the ownership of land, originally granted to Englishmen by Indians in the 1770s, that the United States claimed as descended from the colonial claims of the British government. Marshall established the so-called 'Doctrine of Discovery' asserting that Indians had only rights of occupancy rather than full title to their lands according to American legal concepts. Title lay with those who discovered the land, and only they could sell it. Marshall's corollary 'Doctrine of Conquest' laid the basis for the historical dispossession of Indians of their lands by asserting the power of a conqueror to take land from the conquered.

In the case of *Cherokee Nation v. Georgia* in 1830, the Cherokee Nation challenged the right of the state of Georgia to extend its laws over the Cherokee Nation, and Marshall ruled that Indian Nations, as designated in the US Constitution, were unique entities, now dependent on the government for protection, like 'a ward to its guardian.' This decision formalized the fiduciary or trust relationship between tribes and the US government. This unique relationship, however, meant that the Supreme Court could not hear a suit because its jurisdiction extended only over cases involving states and foreign governments. The Cherokees were neither.

The final decision involved a challenge to the authority of the state of Georgia to exercise its laws in the Cherokee Nation. Samuel Worcester was arrested and imprisoned by the state of Georgia for preaching in the Cherokee Nation without a permit from the state. He brought a suit charging that the state did not have the right to extend its laws over the Nation. In *Worcester v. Georgia* (1831), John Marshall asserted that the responsibility for dealing with American Indians was a federal one, guaranteed in the Constitution. He affirmed the primacy of federal jurisdiction over state jurisdiction and the unique relationship between Indian tribes and the federal government.<sup>6</sup>

All three of Marshall's decisions acknowledged the rights of tribes to govern their own internal civil affairs. It was in their relationships to white society and to the federal government that they were seen as helpless and in need of protection. The fiduciary relationship implies that the guardian will make choices for the best interest of the ward, but as has proven the case throughout the history of Indian-white relations, what the guardian interprets as 'best interest' may differ significantly from the interpretation of the ward. This tension between paternalism and responsibility is evident throughout the history of the relationship between tribes and the federal government. Tribes can call upon the government to honor treaty relationships by providing services promised in those agreements, at the same time that they insist upon their right to maintain the integrity of their own governments.

Indian Nations, however, were faced with the prospect of maintaining their sovereignty at the expense of their tribal lands in the east as Andrew Jackson pushed the Indian Removal Act through Congress in 1830. The act provided that the tribes would exchange their eastern lands for lands west of the Mississippi River and move there. Treaties with the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles, the so-called 'civilized' tribes who had accepted Christian missionary schools and churches, expressed both the desire of the tribes to maintain their own governments and the promises of the United States to protect their new lands west of the Mississippi from invasion by non-Indians. In 1834, the federal government passed the last of the Indian Trade and Intercourse acts, formalizing the federal Office of Indian Affairs as the body in the executive branch to regulate those relationships.<sup>7</sup>

The process of treaty making through the mid-nineteenth century was increasingly coercive as white settlers moved into Indian lands. The transfer of the Bureau of Indian Affairs from the Department of War to the Department of the Interior in 1849 was a symbolic declaration by the US government that Indian resistance was at an end and that the resources of Indian land were now available for exploitation.<sup>8</sup> The Gold Rush of 1848 inspired westward movement. Major treaties at Fort Wise (1851), Fort Atkinson (1861), Medicine Lodge (1867), and Fort Laramie (1868) served to define the land bases of Plains tribes and to reinforce the terminology of dependency of tribes on the federal government.<sup>9</sup>

The Civil War had an enormous impact on the Five Tribes in Indian Territory. Abandoned by the US government, which withdrew its forces as the Confederacy invaded Indian Territory, they signed treaties with the

Confederacy at the start of the war, and the defeat of the Confederacy forced them into new treaties that redefined their relationship to the United States. Although their rights of self-government were recognized, they were forced to cede certain lands to the US government, to admit their freed slaves as citizens of their nations, and to grant rights of way for railroads across their territory.<sup>10</sup>

The completion of the transcontinental railroad in 1869 symbolized the final opening of Indian land to American desire. In 1871, the US government abandoned its practice of making treaties with Indian tribes. Reservations of land and agreements with tribes continued through executive orders by the President of the United States and acts of Congress, but the formality of treaties that acknowledged Indian sovereignty was now a dead letter. Increasingly, legal decisions defined Indian rights.<sup>11</sup> Boarding schools removed Indian children from their homes and contributed to the loss of Indian cultures as children were forbidden to speak their languages, and were not allowed to go home to participate in ceremonial activities.<sup>12</sup>

In 1883, the case of *ex parte Crow Dog* set a new legal precedent. Coming as it did during the general era of Indian policy calling for allotment of land to individual Indians and the dissolution of tribal government, the decision of the Supreme Court in *ex parte Crow Dog* came to the heart of the challenge that Indian sovereignty posed to federal power. When Crow Dog shot his fellow tribesman Spotted Tail on the Brule Lakota (Sioux) reservation in 1883, he was punished by the tribe by having to make restitution to Spotted Tail's kinsmen, but he was also seized and tried in a territorial court and convicted. He appealed to the Supreme Court of the United States, which refused jurisdiction on the grounds that the crime had been committed by Indians on an Indian reservation and was thus a matter for the tribe to settle.<sup>13</sup>

The Court, by allowing a murderer to be left to the jurisdiction of his own people, to be punished as they chose, thus affirmed tribal sovereignty. The Congress of the United States, however, reacting to this perceived affront to American moral values, proceeded to pass the Major Crimes Act in 1885, declaring that the United States had jurisdiction over crimes committed in lands reserved to Indian tribes. The extent of US jurisdiction was tested in 1886 in the case of *US v Kagama*, arising as before out of the killing of one Indian by another on the Humboldt reservation in California. The US Supreme Court accepted the case, thereby establishing a precedent that acts of Congress vis à vis Indian tribes were subject to judicial review as to their constitutionality.

The relationship between tribes and the federal government under the Constitution rests in a single phrase in Article 1, Section 8, governing commerce between the United States and Indian tribes. In a wonderfully convoluted example of legal reasoning in the *Kagama* case, federal attorneys argued that if Indians were killing each other, that situation inhibited the ability of the United States to carry out commerce with the Indians because there were fewer of them to engage in trade.<sup>14</sup> The case thus brought tribes within the purview of the United States Constitution, contravening the fact that tribal governments far preceded the Constitution, and compromising their independent status. This principle of judicial review has become important in the twentieth century as the Supreme Court in the mid-century upheld principles of tribal sovereignty in many of its decisions.<sup>15</sup>

In 1903, the Supreme Court asserted the power of Congress to abrogate Indian treaties in the case of *Lone Wolf v. Hitchcock*, a suit brought by the Kiowa tribe against the Secretary of the Interior. The issue was a treaty provision requiring a vote of at least three-fourths of tribal members before any changes in the treaty could be made. The Supreme Court ruled that the dependency of tribes on the federal government meant that the Congress could decide what was best for the tribes, even if it meant setting aside treaty provisions.<sup>16</sup>

The late nineteenth and early twentieth centuries marked the nadir of tribal sovereignty as the United States government passed the General Allotment Act in 1887, also known as the Dawes Act after its sponsor, Senator Henry Dawes of Massachusetts, a man deeply involved with the social reform movements that characterized the late nineteenth and early twentieth centuries. Indian values of communal property clashed directly with a deeply held American belief in the value of private property, which included a belief in its ability to instill values of thrift, industry, and self-sufficiency in its holders. The Dawes Act provided for the allotment of reservation lands in individual plots of 160 acres to heads of families, eighty acres to single persons over eighteen years of age and to orphans, and forty acres to single persons under eighteen. Title to the land was restricted for twenty-five years, that is, the owner could not sell during that period. These restrictions were intended to protect the land while Indians learned to farm and become self-sufficient.<sup>17</sup>

Several of the tribes in Indian Territory (what is now the state of Oklahoma) — the Cherokees, Choctaws, Chickasaws, Creeks and Seminoles — known as the Five Civilized Tribes), Osages, Sac and Foxes, Miami, Chickasas, and Senecas — were exempt from the act for various reasons. For



the Five Civilized Tribes, it was because their treaties in the 1830s had given them patents in fee simple (that is, full legal title), to their land. Nevertheless, the continued existence of the Indian Territory as an area outside the legal jurisdiction of the United States was anathema to many members of Congress, and in 1889 an act was passed that extended limiting civil and criminal jurisdiction over Indian Territory, thereby making Indians subject to legal action in their dealings with whites (25 Stat. 783).

In 1893 Congress empowered a three-person Commission, chaired by Henry Dawes, to go to Indian Territory to persuade the Five Civilized Tribes to accept allotment of land and a Territorial government and ultimate statehood. After difficult and protracted negotiations, the Commission signed agreements with the tribes providing for allotment of their lands and the ultimate dissolution of their tribal governments. The Curtis Act, passed on 28 June 1898, laid out the terms for allotment and ratified the agreements with the Choctaws, Chickasaws and Creeks. Subsequent agreements were made with the Cherokees and Seminoles.<sup>19</sup>

Although the Dawes Act provided for a twenty-five year trust period, in 1906 Congress passed the Burke Act (24 Stat. 182) which allowed the Secretary of the Interior to grant fee patents to Indians whom he decided were competent to manage their own affairs. Through this mechanism many Indians received title to their lands and subsequently sold them or lost them because they did not pay taxes.

The implementation of the Dawes Act and the Curtis Act has significant implications for contemporary tribal membership. The compilation of rolls of tribal members was a necessary prerequisite for the distribution of tribal lands. Those rolls have become the basis for determining current membership in many tribes. For the Five Tribes, degree of Indian blood was noted on the enrollment cards, refuting distinctions between full bloods, half bloods, quarter bloods, and so on. With regard to land, an act in 1908 (35 Stat. L., 312) provided that Indians of less than half blood would have all restrictions on their lands removed. The Act also lifted restrictions on land after the death of an allottee, meaning that heirs (except minor children) were free to sell the land. The Secretary of the Interior also had the power to lift restrictions based on his judgment of competency. Not only did the Curtis Act provide for the end of tribal sovereignty for the Five Tribes, but the Act of 1908 reified the idea of blood quantum, with the result that members of the Five Tribes lost significant amounts of their lands.<sup>20</sup>

The assault on tribal sovereignty was reversed temporarily in 1934 with the passage of the Indian Reorganization Act, which stopped the allotment

process and allowed tribes to organize their own governments, albeit in forms suggested by the Bureau of Indian Affairs to replicate the United States Constitution.<sup>21</sup> Although the act reasserted a form of self-government, it contained a strong element of fostering economic self-sufficiency that, implicitly, would lead the way to the termination of the federal-tribal relationships.<sup>22</sup> This reassertion of tribal sovereignty came under harsh attack in 1943 as a result of the cost-cutting mentality of the federal government during the Second World War, and in the post-war era the general national prosperity made it appear that Indians would be able to assimilate into American society. The termination policy was explicated in a Congressional action, Joint Resolution 108, in 1953.<sup>23</sup> Secretary of the Interior Fred Zimmerman was asked to draw up a list of tribes that met certain criteria—their ability to sustain themselves economically, their acceptance by their non-Indian neighbors, and their ability to interact with non-Indians.<sup>24</sup> The attempt to terminate the relationship with tribes was finally repudiated by President Richard Nixon in 1970, and in 1973 the American Indian Policy Review Commission was established by Congress to investigate the status of the American Indian tribes.<sup>25</sup> The Final Report of the Commission began with a very strong assertion of the inherent sovereignty of American Indian tribes. Congressman Lloyd Meeds from the state of Washington, and a member of the Commission, issued a strong dissent from the position of the Committee, objecting to the concept of tribal sovereignty, but Congress passed the Indian Self-Determination and Educational Improvement Act of 1975 (88 Stat. 2203).<sup>25</sup> Nixon's repudiation of the termination policy, and the passage of the Self-Determination Act established the basis for the current federal recognition of sovereignty, that is, the ability of tribes to contract for federal funds to run their own social service programs.<sup>26</sup>

Debates over the nature of tribal identity are an underlying theme in discussions of tribal sovereignty. Identity has many markers, both among those who are members of a tribe, and to those looking at the tribe from the outside. Native people today are descendants of peoples who lived in what is now the United States long before Europeans began to settle there. Native people can thus argue that their identity is inherent and descends from their autochthonous ancestors, no matter how remote. In contemporary society, however, the dilution of blood and the effects of federal policies have stripped many communities and individuals of language, ceremonies, and obvious phenotypical difference.<sup>27</sup>

As sovereign entities, tribes exercise their own power to determine who are members of the group. This right of determining membership is gen-

erally deemed one of the powers of any sovereign government, and it has been upheld by the United States Supreme Court in the case of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), in which a female tribal member married to a Navajo man challenged the right of the Pueblo government to pass a law that membership depended upon the father. Mrs. Martinez's children were not eligible for tribal membership even though they lived in the Pueblo and were raised culturally as Pueblo, but the Supreme Court affirmed the tribal ordinance.<sup>28</sup>

In contemporary society, Indian identity may simply be represented by the possession of a Certificate of Degree of Indian Blood (CDIB), issued by the Bureau of Indian Affairs and based on descent from a federally approved roll of original tribal members compiled in the late nineteenth century. Tribes generally require a CDIB before they will issue a tribal enrollment card. Of all ethnic groups in the United States, only American Indians must produce documentary proof of lineage and make a conscious effort to be identified as members of federally recognized tribes. Tribes use blood quantum, that is, biological descent, as the most common criterion for membership.<sup>29</sup> The arbitrariness of this process is again a function of federal policy, because descent is generally determined from an ancestor on a roll compiled in the late 1890s as part of carrying out the allotment of Indian land. It has, however, led to challenges to tribal sovereignty on the grounds that tribes are voluntary political associations rather than unique Indian communities.

Throughout the historical process, the concept of sovereignty has changed — from one of the inherent sovereignty of aboriginal nations in their original homes, to the contested sovereignty of contemporary tribes that pit tribal, state, and federal governments against each other. A major issue in contemporary society is the on-going political tension between federal and state rights, which has complicated the federal-tribal relationship since tribal reservations and trust land are within the boundaries of states.

#### CONTEMPORARY ISSUES IN TRIBAL SOVEREIGNTY

The issues that confront tribes today are rooted in the historical past, but they reflect the current reality of the status of American Indians as a very small population within American society. According to the 2000 census, American Indians constitute 0.08 per cent of the American population.

#### Jurisdiction and land ownership

Jurisdiction is an essential element of sovereignty. The power of a government to govern its citizens derives from its power to control a land base. This power reflects back to our initial premise about the cultural association of Native people to their lands. In modern legal parlance, however, it depends on the ability of tribal groups to control lands that have been fragmented as a result of the federal policy of allotment. The concept of Indian Country was formalized in law in 1948. Indian Country comprises

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. (18 USC 1151)<sup>30</sup>

The issue of jurisdiction is also complicated by the fragmented land holdings in tribal areas. The allotment process essentially froze tribal land holdings at the time that tribal rolls were closed. Children born after the closing could only inherit rather than claim land in their own right. Complicated laws of probate and guardianship and the instability of life in many reservation communities led to increasingly fractionated holdings of tribal land. This legacy of federal policy encouraging private land ownership has effectively removed significant tracts of Indian land from any effective use, and has contributed to administrative chaos in the administration of payments to heirs for income from their lands.

The government's inability to account for possibly billions of dollars of income due to Indians from leases of coal, oil, timber, and grazing rights has led to a lawsuit originally filed in 1996. The case of *Cobell v. Babbitt (91 F. Supp. 2d at 34)* has in turn led to judgments of contempt of court against federal officials, exposure of totally incompetent record keeping with regard to individual Indian trust accounts, shutdown of the Bureau of Indian Affairs Internet site, and a seemingly irresolvable situation in which incomplete records make it impossible to know exactly how much income is due to individual Indian land holders. Congressional attempts to allow Indian



Nations to recover lands from the estates of deceased individuals have thwarted by a Supreme Court holding in *Babbitt, Secretary of Interior, et al. v. Youpe, et al.* (1997) upholding the sanctity of the rights of private owners.<sup>31</sup> The main recourse available to Indian tribes is to sue for removal under historical treaty rights. Given the past federal policy of removing Indians from their homelands by negotiating treaties that called for their removal to other places, the field seems open for reclaiming those original lands where the federal government did not honor its part of the agreement but these arguments are based in complex historical relationships and differing understandings of treaty language, which was often frustratingly vague. Although John Marshall established a principal that treaty language must be interpreted in favor of Indian tribes where there was any ambiguity, courts have not always been lenient in that regard.

### Tribal Courts

Tribal jurisdiction involves some system for making decisions. Tribal traditions of clan and family-based retribution have given way to more formal tribal court systems, although some tribes have integrated elements of arbitration as settlement.<sup>32</sup> The Indian Civil Rights Act in 1968 extended the provisions of the Bill of Rights to Indian tribes, with certain modifications to allow for theocratic forms of government among the Pueblos and the operations of tribal courts. It restricted those operations by limiting the amount of fines and the lengths of sentences they could impose, and limiting their ability to hold prisoners for criminal offenses. It imposed restrictions on the right of tribes to govern themselves by requiring tribal governments to adopt a set of laws that largely replicated the Bill of Rights. Despite the limitations, the Supreme Court affirmed tribal sovereignty by upholding the decision of the tribal court in *Santa Clara Pueblo v. Martinez* in 1968.<sup>33</sup>

### Taxation

The power to tax is an element of sovereignty. In American society the public sector (that is, governments) collect taxes from the private sector (that is, individual wage earners, entrepreneurs, and property owners). Taxes support the government so that it can provide services to its citizens. The concept of taxation was unknown in communal tribal societies, which were based on social obligations of reciprocity structured by kinship systems, and chiefs assumed responsibility for those in the society (widows, orphans) who

had no kin to support them. The well-being of individuals was the concern of extended families. In contemporary society, tribal governments provide services for their members – educational programs, nutrition programs for expectant mothers and the elderly, healthcare – largely through federally funded programs which they contract to operate under the Indian Self-Determination and Educational Improvement Act of 1975.

If the power to tax is an essential part of governance, it also raises unique issues for Indian tribes. If tribes impose taxes on tribal members to support their operations, will the federal government find reason to reduce funding for programs that Indians feel are based on treaty obligations? Indian land is not subject to taxation by states or the federal government, and Indians working on Indian land do not pay state income taxes. Tribes have developed enterprises on tribal land that are exempt from state taxation – private sales of tobacco products and gasoline. The fact that these products encourage non-Indian consumers to buy from tribes rather than private businesses exacerbates the tension between states and tribes. Indian land is encompassed in state land. The tax exemptions that tribes enjoy have been a major point of contention between tribal and state governments.<sup>34</sup>

The issue of taxation points up the conflict between states and tribes, and the larger states' rights issues that have been continually contested between the federal government and states. The state of Oklahoma, for instance, has consistently challenged the exemption of tribes (whose very existence has been at issue since 1907 when the Indian Territory in eastern Oklahoma was joined with Oklahoma Territory to form the new state) from state taxes.<sup>35</sup>

### Economic Development

The policy of the United States government in the late nineteenth century was to impose individual ownership of land to encourage economic self-sufficiency. In the twentieth century, beginning with the Indian Reorganization Act, the government embarked on an explicit policy to make tribes economically self-sufficient in the wage-based, capitalistic economy of modern America. This shift in policy has introduced a new set of issues into American Indians' traditional relationship to their homelands.

### Gaming

The Indian Gaming Regulatory Act of 1988 (IGRA) demonstrates most pointedly the complex issues of Indian self-government, federal policy, and

where humans could communicate with the spiritual world out of control of tribes. Sites of traditional vision quests where men sought spiritual power have generally become parts of national parks and forests because of their unusual aspect and physical beauty. Indian people recognized their distinctive features as sources of spiritual power. Protection of sacred sites is an essential aspect of tribal sovereignty, but it is also one of the most contentious because it pits tribal rights to freedom of religious expression as both a cultural issue and a first amendment issue under the US Constitution against federal issues of the greater good of American society. Because Indian religions are based in their association with land which is generally beyond their legal control, when they seek exclusive rights to use public lands for religious use, issues concerning Indian religious practice and use of land come into direct conflict with the notion that public lands exist to be used for the benefit of the American public.<sup>38</sup>

Two court cases decided by the Supreme Court in 1988 have become touchstones for the issues of religious freedom in the twenty-first century. The case of *Lying v. Northwest Indian Cemetery Protective Association* resulted in a Supreme Court decision that the greater economic good of American society meant that a logging company had the right to build a road through forest areas where the 'doctors' of the Tolowa, Yokuts, and Karok tribes went to seek their spiritual powers.<sup>39</sup>

The case of *Employment Division v. Smith* in 1990 reinforced the premise that the greater good of the American public overrode Indian rights to traditional religious practices.<sup>40</sup> At issue was the use of peyote by members of the Native American Church, a legally incorporated religion that had been established in 1918 to protect a new form of Native religion that had arisen in response to the suppression of the Ghost Dance and the Sun Dance by government agents.

The Smith case was not an Indian issue. It rather affirmed the right of the state of Oregon to make laws for what it perceived as a greater public good and that contravened certain rights of religious freedom. It provoked significant response not only in Indian communities but a much wider response in non-Indian communities that led to further Congressional action and Supreme Court review. It also led the Congress of the United States to pass a law that protected the use of peyote by members of the Native American Church, thus establishing a federal precedent to override state laws.<sup>41</sup>

The essential nature of land for cultural identity has led the Choctaw Nation in Oklahoma to provide buses to transport tribal members in

Oklahoma to Tennessee to visit an archaeological site on the outskirts of Memphis that is associated with the tribal origins, and to Nanh Waiya, the mound in north-central Mississippi that is associated with the tribal origin tradition. Although issues of the use of land for spiritual purposes have become embroiled in the legal processes of American society, land and relation to certain physical sites are still a part of day-to-day identity for many Indian people.

### Repatriation

The correlation between tribal sovereignty and cultural integrity is most apparent in the passage of the National Museum of the American Indian Act (20 USC 3, XIII) and the Native American Graves Protection and Repatriation Act of 1990 (25 USC 32). The NMAI Act mandated that the Smithsonian Institution in Washington would return Indian human remains and associated funerary objects, (grave goods) to American Indian tribes. The Native American Graves Protection and Repatriation Act extended that mandate to all museums and repositories receiving federal funding, and also expanded the categories of objects to include sacred, objects, unassociated funerary objects, and objects of 'cultural patrimony,' (that is, things that were held to be owned by the tribe as a whole and that could not be alienated from the tribal holding by any individual). These two acts create a federal mandate through which Native people can recover objects that are essential to their religious practices and their cultural identity.<sup>42</sup> They speak directly to the unique relationship between Indian tribes and the US government, since tribes have the right to present their claims, and to the relationship between tribal sovereignty and Indian culture.

### Social Issues

American Indian identity is based primarily in families, and the assault on Native families in the twentieth century has been a major policy issue for tribes. The historical assault on Indian families was explicit in the nineteenth-century federal policy of sending children to boarding schools, where they were to be stripped of their tribal identity, forbidden to speak their tribal languages, and changed into models of American citizens. The boarding school policy had significant implications for Indian identity. Native languages declined as English became the common language of couples who met in boarding schools and married. Students indoctrinated in the assimilationist

policy of the boarding school chose not to teach their languages to their children.

### The American Indian Child Welfare Act

The policy of removing children from their homes extended into the twentieth century as state and federal social service agents exercised their discretion to remove children from what they perceived as unhealthy home situations, and to place them in non-Indian foster homes. The American Indian Child Welfare Act of 1978 asserted the right of Indian tribes to determine the placement of tribal children with Indian families rather than in non-Indian foster homes. The act reaffirmed the sovereign right of American Indian tribes to protect their children and give them a grounding in their own tribal cultures. The Supreme Court upheld that right in the case of *Mississippi Choctaw Indian Band v. Holyfield*, a case in which an unmarried Choctaw couple arranged for the birth of their twin children off the reservation and their adoption by a non-Indian couple. The court ruled that the American Indian Child Welfare Act created a jurisdictional situation that could not be thwarted by the parents' action, thus affirming the sovereign right of the tribal government to control the actions of its citizens.<sup>43</sup>

### CONCLUSION

Sovereignty is an essential concept in Native American Studies programs. It is key to understanding the historical relationship of Indians to non-Indians, and it is critical to the future of tribes as recognizable entities in American society. It must be understood as a matter of identity, that is, the right of a tribe to define its own members and of members to identify themselves as tribal members. It is a political issue as tribes exercise their rights to self-government vis à vis federal, state, and local government with which they must interact.

Sovereignty is an idealistic construct, but in its practical application it is subject to constraints. Legally, Indians are subject to certain Congressional laws that are still in force: the Major Crimes Act, which currently extends federal jurisdiction over Indians charged with one or more of thirteen crimes named in the Act; the Indian Civil Rights Act, which puts limits on the terms and fines that tribal courts can levy, and offers the right of habeas corpus to persons held on charges in tribal jails; and the Indian Gaming

Regulatory Act, which subjects tribes to the necessity of bargaining with states if they wish to establish casinos. Federal law defines Indian country, with complex jurisdictional distinctions made on the basis of the race of the plaintiff and the defendant, and whether the crime occurred in Indian country or outside.

Although the Marshall decisions affirm the 'dependent, domestic nations' as dependent on the federal government, recent shifts in federal policy, including the Indian Gaming Regulatory Act and state challenges to the tax-exempt status of tribal business operations, raise the spectre of the federal government delegating its responsibility to state governments. The concept of sovereignty is under political attack on many fronts, and the struggle to protect it may also be a source of assertions of tribal identity.

The idea of a self-governing community, in a practical sense, is also often a matter of contention within groups. Tribal constitutions — the major systematic expression of sovereignty because they are subject to the approval of the Bureau of Indian Affairs according to the Bureau's policies — and tribal elections become contentious when factions within the community question their legitimacy. These internal struggles call attention to the fact that there may not be unanimous agreement on what is the legitimate government of a community. The idealistic call to responsibility to one's community often raises the question, who represents the community?

The heart of the concept of sovereignty is twofold: people, and land. The power of a government to control its land lay in a sense of communal property defined by its use for subsistence and spiritual purposes. In modern American society, tribal land often means control of economic resources — timber, minerals, grazing land, and water — and it is often the case, as in the Winters doctrine, that the perceived good of the general public comes into conflict with the treaty rights of Indian tribes, and that federal courts become the deciding ground in the resulting contest. Tribes must then decide between affirming abstract rights and engaging in prolonged litigation without the guarantee of a favorable judgment, or reaching negotiated settlements that assure that they receive a defined benefit from their resources.

In Native American/American Indian Studies programs, tribal sovereignty must be taught both as an ideal to be sustained, and one whose meaning is constantly under negotiation with states, in federal courts, and with the Congress of the United States.



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